U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

BRYAN K. PITTMAN,
COMPLAINANT,

v.

GOGGIN TRUCK LINE, INC.,

RESPONDENT.

ARB CASE NO. 97-120

(ALJ CASE NO. 96-STA-25)

DATE: SEP 23 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

The Administrative Law Judge (ALJ) submitted a Recommended Decision and Order (R. D. and O.) in this case arising under the employee protection provisions of the Surface Transportation Assistance Act of 1982, as amended (STAA), 49 U.S.C.A. §31105 (West 1996), finding that Respondent, Goggin Truck Line, Inc. (Goggin), discriminated against Complainant, Bryan Pittman (Pittman), when it discharged him in February 1994. Goggin filed a brief in opposition to the R. D. and O. For the reasons discussed below, we find that the ALJ's findings of fact are supported by substantial evidence, 29 C.F.R. §1978.109(c)(3) (1996), hold that the conclusions of law are correct, and adopt the R. D and O.

Background

The facts are summarized in detail in the R. D. and O. at 3-10. Pittman worked for Goggin as a truck driver from June 1993, until his termination in February 1994, driving trucks between Goggin's Lumberton and Charlotte, North Carolina terminals. R. D. and O. at 3. Loren Torgerson, manager of the Lumberton terminal, on the night of February 16, 1994 assigned Pittman to drive tractor number 504 (No. 504) to the Charlotte terminal, where Goggin had a mechanic shop, so that it could be repaired. *Id.* at 4. Torgerson only told Pittman "there was something wrong with the suspension," but did not know specifically what the problem was and did not give Pittman any more information about it. T. (Transcript of hearing) 184. Pittman experienced difficulty steering No. 504 on the way to Charlotte, R. D. and O. at 4, and some time after arriving there complained to the dock supervisor about being assigned an unsafe truck. *Id.*[1]

[1] Goggin claims Pittman could not have had a reasonable apprehension of serious injury (continued...)

Pittman returned to Lumberton in the early morning of February 17, C (Complainant's exhibit 3), but Torgerson told him later that day he was not needed that evening. R. D. and O. at 5. When Pittman called for an assignment on Friday, February 18, 1994, Torgerson told him he was suspended indefinitely. Pittman went to the Lumberton terminal to pick up his check and Torgerson told Pittman he was suspended because of his "attitude." *Id.* Pittman tape recorded this conversation without Torgerson's knowledge and the tape and a transcript of it were admitted in evidence over Goggin's objection. *Id*.

Torgerson noted a deterioration in Pittman's attitude in the weeks before the protected activity and made two attempts to counsel Pittman, one on February 15, and one on February 16 just before Pittman made the trip to Charlotte in No. 504. R. D. and O. at 7-9; 18-19. Frank Leckwart, Goggin Vice President of the Eastern Division in Charlotte, had been informed about the problems with Pittman. When Leckwart was told about Pittman's poor attitude in the counseling session of February 16, Leckwart told Torgerson to suspend Pittman on Friday, February 18. Leckwart consulted with the Goggin safety and human resources officials at company headquarters between Friday evening and Monday morning, and they reached the decision to fire Pittman on Monday February 21, allegedly because of a bad attitude. T. 228-229.

Discussion

Goggin disputes Pittman's assertion that he complained about the safety of No. 504 to John Harris, the Charlotte dock supervisor, on the night of February 16, 1994. There were direct conflicts in the testimony of Harris and Pittman about what they discussed that night, but the ALJ believed Pittman, discounted Harris' testimony, and found that Pittman did make a protected internal safety complaint. R. D. and O. at 15-16.[2]

---

[1](...continued)
because he did not question Torgerson about the nature-of the problem with No. 504 and did not immediately take No. 504 to the mechanic shop when he arrived in Charlotte. Pittman's asserted protected activity here was his internal complaint about the safety of No. 504, 49 U.S.C.A. §31105(a)(1)(A), not refusal to drive because of a reasonable apprehension of injury. *See 49* U.S.C.A. §31105(a)(1)(B)(ii). We agree with the ALJ that protection for safety complaints is not contingent on reasonable apprehension of injury. R. D. and O. at 16-17.

[2] After finding that Pittman engaged in protected activity, the ALJ engaged in a detailed analysis of whether Pittman established a *prima facie* case, whether Goggin rebutted it by articulating a legitimate reason for the discharge, and whether Pittman showed that the stated reason was pretextual. As the Board and the Secretary have repeatedly noted

> [i]n a case such as this, in which [Goggin] articulated legitimate, nondiscriminatory reasons for its alleged adverse action and the case has been fully tried . . . . the question whether [Pittman] previously established a *prima facie* case becomes irrelevant. *Carroll v. Bechtel Power Corp.,* Case No. 91-ERA-0046, Sec. Dec. and Order, Feb. 15, 1995, slip op. at 11, *aff'd, Carroll v. United States Dept. of Labor,* 78 F.3d 352, 356 (8th Cir. 1996). "The [trier of fact] has before it all the evidence it needs to determine whether 'the defendant intentionally

(continued...)

We find that the ALJ made reasonable inferences from the evidence and we adopt his finding that Pittman did engage in protected activity. The ALJ inferred that Torgerson's statement on the tape recording that Pittman was being suspended because of statements he had made at the Charlotte terminal referred to Pittman's protected safety complaint.[3] The ALJ specifically credited Pittman's testimony about the meaning of the conversation, i.e., that Torgerson and Pittman were discussing Pittman's protected activity. R. D. and O. at 5 and 13. On the tape, Torgerson appears to be referring to Pittman's remarks about the safety of the truck. Transcript of tape recording at p.3. The ALJ also found that Pittman's testimony about his safety complaint to John Harris was more credible than Harris' denial that he had discussed the safety of No. 504 with Pittman because Harris was preoccupied with many other matters that night and had difficulty remembering it two years later at the hearing. *Id*. at 15-16.[4]

Goggin points to a number of inconsistencies in the record, which the ALJ did not resolve, as undermining Pittman's credibility. For example, Pittman testified that he drove No.

---

[2](...continued)
discriminated against the plaintiff." *USPS Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (1983) (quoting *Texas Dept. of Community A ffairs v. Burdine,* 450 U.S. 248, 253 (1981). Rather, the question is whether [Pittman] established by a preponderance of the evidence that [Goggin] discriminated against [Pittman] on the basis of [protected activity]. *See Carroll,* 78 F.3d at 356.

Michaud v. BSP Transport, Inc., Case No. 95-STA-29, ARB Dec. Jan. 6, 1997, slip op. at 4.

We reject Goggin's assertion, however, that the ALJ did not properly allocate the burdens of proof under *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993). The ALJ said "the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee." R. D. and O. at 18.

[3] Goggin asserts the ALJ erred in admitting the tape and transcript of the February 18 Torgerson-Goggin conversation because 1) it is inadmissible under 29 C.F.R. §18.44, and 2) it is not complete, accurate or trustworthy because portions of the tape are inaudible or incomprehensible. We note that 29 C.F.R. §18.44 in the 1996 edition of the Code of Federal Regulations contains no text and is "[Reserved]." We agree with the ALJ that the tape and transcript are admissible under 29 C.F.R. §18.801(d)(2)(iv) (1996) and that admission of these items was well with the ALJ's discretion. *See Vukadinovich v. Zentz,* 995 F.2d 750, 753 (7th Cir. 1993) (court has broad discretion whether to admit audio tapes). We also note that the tape recording itself is admissible as evidence, just as an original photograph or other type of mechanical or electronic recording. 29 C.F.R. §18.1001-1002. Both individuals whose conversation was recorded testified at the hearing and both parties had an opportunity to elicit testimony about any inaudible or incomprehensible portions of the tape, and Torgerson did not deny making the statements heard on the tape. T. 200-204.

[4] On the tape, Torgerson says to Pittman "I don't know what you said to David, Bud, but it was the wrong thing." Transcript of tape, p. 3. David Carter was the Charlotte second shift supervisor. T. 199. Torgerson did not remember making this statement. T. 200.

504 from Charlotte back to Lumberton on the early morning of February 17, while mechanic Wilson testified that No. 504 was not repaired until after Pittman left and that Pittman took No. 600 back to Lurnberton.[5] Although the ALJ noted the difference in testimony on this point, R. D. and O. at 5, he did not explicitly resolve the conflict. We do not agree with Goggin that establishing which truck Pittman drove back to Lumberton would contradict the ALJ's conclusion that Goggin violated the STAA; at most, it would be a factor to be weighed in evaluating Pittman's credibility. As discussed above, the ALJ found several times that Pittman was more credible than witnesses for Goggin, e.g., Torgerson and Harris. Goggin also argues that the record shows Pittman knew about the defect in No. 504 before he left Lumberton on February 16 because Torgerson and Carson Glover, the previous driver of No. 504, told him about it. This is not inconsistent with Pittman becoming upset in Charlotte when he learned that No. 504 had what he believed was a serious steering problem; Torgerson only told him it needed work on the suspension, T. 184, and Glover just said it had a slight pull in the steering. T. 153.

We agree with the ALJ that Pittman carried his burden of showing that his complaint about the safety of No. 504 was the "precipitating" cause of his discharge. The record does show that Goggin was concerned about Pittman's deteriorating attitude before the protected activity. R. D. and O. at 18-19. But until February 16, when Pittman complained about the safety of No. 504, Goggin's approach to the problem of Pittman's attitude was to investigate the matter and assist Pittman. Vice President Leckwart testified that he had been told Pittman had been a good employee, but a problem had developed with his attitude and that it was something to be looked into "so that we could salvage the employee or address whatever his problem was." T. 220. Leckwart explained that Goggin had an interest in "salvaging" an employee because of the shortage of qualified drivers and the time and expense of finding and hiring another. T. 225.

But immediately after Pittman's protected safety complaint on February 16, 1994, Leckwart decided to suspend Pittman on Friday February 18, and working through the weekend, Leckwart and the safety/human resources committee reached the conclusion to fire Pittman on Monday, February 21. T. 227. The ALJ rejected Leckwart's denial of knowledge of Pittman's protected activity and found that the protected activity was the cause of Leckwart's agitation when he told Torgerson to suspend Pittman. R. D. and O. at 20.[6] The decision to fire Pittman originated with Leckwart although it had to be endorsed by the committee. *See Frazier v. Merit Systems Protection Board,* 672 F.2d 150, 166 (D.C. Cir. 1982) ("[C]onstructive knowledge of Complainant's protected activities on the part of one with ultimate responsibility for personnel action may support an inference of retaliatory intent.") The record also supports the ALJ's conclusion that Goggin did not carry its burden of showing that it would have taken those

---

[5] Goggin argues that Pittman's log is inconsistent with his testimony that he drove No. 504 from Charlotte to Lumberton in the early morning of February 17. But his log states he drove No. 504 from 2:45 to 5:45 AM from Charlotte to Lumberton. C-3. There was some confusion about which tractor he drove on February 15. C-3; T. 264.

[6] Torgerson told Pittman on February 18 "you must have said something [in Charlotte] because Frank [Leckwart] is freaking." Transcript of tape recording of Pittman/Torgerson February 18, 1994 conversation at p. 3

adverse actions against Pittman, at that time, based only on his attitude problem. R. D. and O. at 20; *see* discussion above at 5.

Goggin did not file objections to the ALJ's findings and recommendations on reinstatement, damages, attorney's fees and costs, but relied entirely on the argument that it did not violate the statute. The ALJ's recommendations regarding these issues are reasonable and we adopt them, as set out in the following order.

ORDER

Respondent, Goggin Truck Line, Inc., is ORDERED TO:

1 . Reinstate Complainant, Bryan Keith Pittman, to his former employment with the same pay and terms and privileges of employment;

2. Pay back pay to Complainant in the sum of $46,596.99 for loss of pay through and including February 7, 1997.

3. Pay back pay to Complainant of an additional $213.00 per week thereafter until Complainant is reinstated to his former employment or declines a *bona fide* offer of reinstatement. This calculation is based on the difference between Complainant's weekly wage at the time he was terminated of $642.00 and his presents average weekly income of $429.00;

4. Pay interest on the sums awarded to Complainant calculated in accordance with 26 U.S.C. section 6621 (1988); and

5. Pay attorney's fees in the amount of $16,115.30 and expenses in the amount of $615.30.

SO ORDERED

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member